

ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 91-206

Decided September 12, 1991

Appeal from a decision of the Area Manager, Paradise-Denio Resource Area, Winnemucca, Nevada, Bureau of Land Management, rejecting protest of proposed grazing decision for the Hot Springs Peak Allotment.

Affirmed.

1. Rules of Practice: Appeals: Failure to Appeal--Wild Free-Roaming Horses and Burros Act

When BLM determines in its land-use planning process to remove wild horses from a grazing allotment and, following notice to interested parties, implements that plan, a challenge to a subsequent BLM decision allocating grazing use in the allotment, by a party who received notice of the removal, on the basis that wild horses were improperly removed and should be relocated into the allotment, is untimely.

APPEARANCES: Nancy Whitaker, Sacramento, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by the Animal Protection Institute of America (APIA) from a February 28, 1990, decision of the Area Manager, Paradise-Denio Resource Area, Winnemucca, Nevada, Bureau of Land Management (BLM). That decision rejected appellant's protest of the proposed decision for the Hot Springs Peak Allotment. Simultaneously, BLM issued the final decision allocating grazing use within that allotment.

Appellant bifurcated its appeal into two parts. Part I challenged the BLM determination regarding the authorized grazing use by the grazing permittee. Final BLM decisions adjudicating protests of proposed decisions regarding grazing permits or leases are subject to appeal for the purpose of a hearing before an Administrative Law Judge by a person whose interest is adversely affected. 43 CFR 4160.4. A March 26, 1991, cover memorandum transmitting the case file to this Board explained that the appeal and the case file were originally transmitted to the Hearings Division, Office of Hearings and Appeals, on June 14, 1990, and that following a prehearing

conference with Administrative Law Judge Rampton on February 20, 1991, it was concluded that IBLA should review the wild-horse portion of the appeal. 1/ Thus, Part I of APIA's appeal is currently pending before Judge Rampton. 2/

Part II of APIA's appeal, which is before us, challenges the aspects of the decision relating to management of wild, free-roaming horses and burros.

The APIA protest of the proposed decision objected to the removal of wild horses from the Hot Springs Peak Allotment on the basis of the checkerboard pattern of interspersed Federal and private land ownership in the area. The protest asserted that objectives for wild horses should be included in the grazing decision, including the relocation of a viable herd of horses into the area where wild horses were found in 1971 and monitoring of range and habitat conditions.

In its decision issued in response to the APIA protest, BLM found the protest of the removal of wild horses from the allotment to be untimely. It stated that the land-use planning process which called for removal of wild horses was completed in 1982 and the capture plan itself had been served on APIA prior to removal of the wild horses in 1986. In response to the proposal to relocate a herd of wild horses to the allotment, BLM held that in accordance with the relevant provision of the Management Framework Plan (MFP), it is directed to remove wild horses and burros from checkerboard lands unless a cooperative agreement for the maintenance and protection of wild horses is signed with the affected private landowner. BLM explained that the private landowners refused to enter into cooperative agreements and requested removal of the horses. Acknowledging that the Hot Springs Mountain Herd Use Area contains an area of blocked public lands, BLM explained that wild horses and burros were removed because BLM was unable to keep them from straying onto private lands.

On appeal to the Board, APIA acknowledges that the decision regarding wild horses was based on the relevant provision of the land-use plan, but argues that "the Hot Springs Allotment portion of the HMA [Herd Management Area] lies outside the checkerboard lands" (Statement of Reasons at 3). Further, appellant asserts that 53,000 acres of the Hot Springs Peak Allotment have been identified as an area where horses were found in 1971.

The Winnemucca District Manager responded to the APIA appeal in a memo-ramdum to the State Director dated March 5, 1991, which was accompanied by

1/ Appeals from BLM decisions regarding wild horses and burros are subject to appeal to the Board of Land Appeals. 43 CFR 4770.3.

2/ The Winnemucca District Manager has indicated by memorandum of Mar. 5, 1991, that the appeal of the grazing decision for the Hot Springs Peak Allotment has been scheduled for a hearing on Sept. 23, 1991.

supporting documentation. ^{3/} In addition to reiterating that removal of wild horses was addressed when the MFP decision at Wild Horse & Burros 1.4 was issued and when the wild-horse removal decision was issued, BLM addressed the fact that certain lands within the Hot Springs Peak Allotment are not interspersed with private lands in a checkerboard pattern. BLM contends that:

[T]he consolidated public lands on the north end of the Hot Springs range was an integral part of the Hot Springs Herd Use Areas. * * *

The Unit Resource Analysis, done to provide information in the land use planning process, indicates that horses were known to interchange among the Hot Springs Mountains area and the Lower Paradise Use Area and the Osgood Mountains Use Area. * * *

If horses are returned to the Public Land on the north end of the Hot Springs Mountains, the Bureau would not be able to properly manage them so they would not use the water sources and vegetation found on private lands.

(Memorandum of Mar. 5, 1991, at 2).

BLM has also requested immediate review of that part of the appeal dealing with wild horses and burros in order that the case may be remanded to Judge Rampton for hearing together with the grazing appeal.

The context of this appeal presents a threshold question of the jurisdiction of the Board to entertain this appeal. In view of this fact, we have expedited our review of this case. This is a direct appeal from the final decision of BLM denying a protest of the proposed decision setting the terms and conditions for grazing by the permittee within the allotment. Such decisions are issued under the regulations at 43 CFR Subpart 4160. The relevant regulation provides that any person whose interest is adversely affected by a final BLM decision under this part may appeal the decision for the purpose of a hearing before an Administrative Law Judge. 43 CFR 4160.4; 43 CFR 4.470. The right of appeal to an Administrative Law Judge for a hearing is grounded in section 9 of the Taylor Grazing Act dealing with grazing administration which directs the Secretary of the Interior to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer." 43 U.S.C. § 315h (1988). The right to a hearing on appeal from decisions of the authorized officer made in the administration of grazing districts has been recognized by the courts. See LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir.), cert. denied, 376 U.S. 907 (1964); Joel Stamatakis, 98 IBLA 4, 7-8 (1987). On the other

^{3/} It appears from the cover memorandum of Mar. 26, 1991, transmitting the case file to this Board that a copy of the Winnemucca District Manager's memorandum and the attached documentation was provided to the appellant.

hand, decisions regarding management of wild horses made under the regulations at 43 CFR Part 4700 are subject to appeal directly to this Board by a person adversely affected. 43 CFR 4770.3.

It is true that this Board has in the past exercised jurisdiction over an appeal from a decision to remove wild horses from a portion of the public lands where BLM simultaneously adjudicated grazing privileges within an allotment. Thus, we have held that where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an Administrative Law Judge pursuant to 43 CFR 4.470, and wild-horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild-horse appeal may be referred to the Administrative Law Judge for hearing and consideration together with the grazing appeal to the extent it involves related factual issues requiring a hearing. Animal Protection Institute of America, 118 IBLA 345 (1991). However, that does not appear to be the situation in the present case.

[1] The MFP calling for removal of all wild horses from the Hot Springs Peak Allotment was approved in 1982 and an implementing decision to remove wild horses from the allotment was issued in 1986. The proposed decision of BLM which led to the APIA protest prescribed the amount and season of livestock grazing use to be allowed based on monitoring of the forage availability and condition. The decision under appeal did not authorize the removal of wild horses from the allotment. That action was authorized and carried out in 1986 subsequent to notice by letters dated April 8 and September 17, 1986, addressed to various parties including appellant (Attachments 7 and 8 to record supplement). Thus, when APIA challenged BLM's decision allocating grazing use within the Hot Springs Peak Allotment on the basis that wild horses were improperly removed from and should be relocated into the allotment, such a challenge was untimely. 4/ Accordingly, we find that BLM properly concluded that APIA's protest of its proposed decision was untimely to the extent it objected to the removal of wild horses from the allotment. 5/

The balance of the appeal involves the management and allocation of forage within the grazing allotment. As previously indicated, appeal of this matter is presently pending before Administrative Law Judge Rampton. See 43 CFR 4160.4. This Board's jurisdiction is properly invoked when a grazing decision by the Administrative Law Judge is appealed pursuant to the regulation at 43 CFR 4.476.

4/ In this case, if APIA desired to contest the removal of wild horses from the Hot Springs Peak Allotment, it should have protested BLM's proposed gather, of which it had notice in 1986. A BLM decision denying such a protest would have been appealable to this Board. 43 CFR 4.411(a).

5/ APIA's request that wild horses be relocated into the Hot Springs Peak Allotment must be rejected. Such a request is premised upon a contention that removal was improper. As we have concluded, objections to removal at this juncture are untimely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from, as it relates to wild-horse removal or relocation, is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge